son, 39 Cal., 704; Peo. *v.* Bezy, 67 Cal., 223; but when the defendant has been convicted on direct proof, the admission of such evidence is harmless error. Webb *v.* Com., (Ky.), 12 S. W. Rep., 769. When attacked, the attack may be rebutted by proof of a peaceable and quiet disposition: Hussey *v.* State, 87 Ala., 121; S. C., 6 So. Rep., 420; Davis *v.* Peo., 114 Ill., 86; S. C., 29 N. E. Rep., 192, but the rebutting evidence must meet the direct, and proof of a violent disposition is not met by evidence that deceased had not the character of being a bad boy. The two traits are not the same. Martin *v.* State (Ala.) 8 So. Rep., 858.

D. The character of a house, as a nuisance, a bawdy house, etc., may be shown by evidence of the reputation of the persons who frequent it, or the reputation in which it is held. State *v.* Bunnell, 29 Wis., 435; Betts *v.* State, 93 Ind., 375; Whitlock *v.* State (Ind.), 30 N. E. Rep., 934; State *v.* Fleming, (Iowa), 53 N. W. Rep., 235.

[NOTE.—Very instructive and interesting articles on this general subject, containing a number of cases not cited here, will be found in 30 Cent. L. J., 241; 31 Cent. L. J., 229; 3 A. & E. Enc. of Law, 110–118.]

ARDEMUS STEWART.

SMITH *v.* SMITH,[1] SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Non-expert Opinion—Testamentary Capacity.

On the trial of an issue whether the testator was of sound mind, a witness who had observed the mental and physical condition of the testator for twenty years, but who was neither an attesting witness to the will, an attending physician, nor an expert in matters of mental condition, was asked "whether, from the general appearance of the testator, he considered him capable of making a contract, or of transacting important business." *Held*, that the question called for an opinion on the mental condition of the testator, and was properly excluded.

THE ADMISSIBILITY OF NON-EXPERT TESTIMONY TO SHOW MENTAL INCAPACITY.

The history of the development of legal principles and rules of procedure shows the impossibility of formulating such rules as shall anticipate the requirements of new phases of fact.

The broad rule of evidence which confines the testimony of witnesses

[1] 32 N. E. Rep., 348.

to facts alone, and gives to the jury the sole right to draw the inferences suggested by the facts, has its source in the danger of prejudicing the interest of a party to the cause by swaying the jury by opinions relative to the facts expressed by persons unconnected with him: Best Ev., 495. The difficulty in applying this rule in strictness arises from two causes: *First*, the growth of learned sciences and of special branches of knowledge; and *second*, the vagueness which is inherent in the distinction between matter of fact and matter of opinion. In the first case it is patent that a necessity has arisen, and has at no time been more imperative than at present, to call as witnesses men skilled in the various departments of knowledge, for the purpose of informing the jury as to the proper deductions and inferences to be drawn from given facts according to the light of science, concerning which men having no special training are ignorant.

In the second case, it is impossible in many instances to admit evidence of the facts in question without letting in at the same time the opinion of the witness upon those facts. "In all supposed statements of fact the witness really testifies, consciously or unconsciously, to the opinion formed by his judgment upon the presentment of his senses. Statement of opinion is therefore necessarily involved in statement of fact." Whart. Ev., § 15. To attain the highest justice in any given case the best evidence must always be obtainable and admissible. When, in answer to the question, "What is the best evidence?" we discover that to admit what we have found, will infringe upon a rule of procedure, justice demands, not that evidence be cast aside, nor that the rule be abrogated, but that an exception or modification of the rule be formulated.

In Omychund *v.* Barker, 1 Atk., 19, Lord HARDWICKE said: "The judges and sages of the law have laid it down that there is but one general rule of evidence—'the best the nature of the case will admit.'"

The testimony of non-expert witnesses in matters of opinion may be divided as follows:

(1) Where in stating the facts an opinion is expressed *ex necessitate*, as, where a witness is desired to describe a sound, a color, an appearance, the identity of one object or thing with another, questions of value, etc.

(2) Where the witness gives his opinion as to a matter depending upon special knowlege, having stated the facts upon which he bases his opinion (Whart. Ev., § 515); as the apparent extent of suffering of an individual to whom the witness was nurse: Heddles *v.* Chicago & N. W. Rwy. Co. (Wis.), 46 N. W., p. 5 (1891); the safety or convenience of highways, the witness being familiar with highways and their use: Laughlin *v.* Street Rwy., 62 Mich., 220; the effect of liquor on one with whom the witness is familiar: Cole *v.* Bean, 1 Ariz., 377; People *v.* Monteith (Cal.), 14, P. 373; as to values, rentals, etc.: Wood *v.* Baylis, 10 N. Y. S., 62; Chamberlain *v.* Dunlop, 8 N. Y. S., 125.

In issues *devisavit vel non*, and in actions to determine the validity of deeds, there has been much conflict and fluctuation of authority as to the admissibility of non-expert testimony to determine the mental capacity of the testator or grantor Insanity,

while in many cases the expert's peculiar province of inquiry, yet is shown in so many ways that are plain to the ordinary observer, that expert testimony is not only unnecessary, but the best evidence obtainable is undoubtedly that of those who have had special opportunities for observing the individual by their association with him. Non-expert testimony in cases of insanity is divided into (*a*), that of attesting witnesses of wills; and (*b*), that of all other non-experts.

The admissibility of testimony of the first class is not questioned by any authority, but is confined to the attesting witnesses of wills alone, excluding the testimony of the attesting witnesses of deeds, who are on the same plane as all other non-experts: Egbert *v.* Egbert, 78 Pa., 326. The subscribing witnesses to a will may always give their opinions concerning the sanity or insanity of the testator at the time he signed the will in their presence, "whether they happen to be attending physicians, nurses, children, or chance strangers." The distinction is made because their signatures to the will are an assertion that the testator was of sound mind when he signed it: Poole *v.* Richardson, 3 Mass., 330; May *v.* Bradlee, 127 Mass., 414; Com. *v.* Brayman, 136 Mass., 414; Culon *v.* Haslam, 7 Barb., 314; Clapp *v.* Fullerton, 34 N. Y., 190; Brand *v.* Brand, 39 How. Pr. Rep., 193; Van Huss *v.* Rainbolt, 42 Tenn., 139; Unes *v.* Lee, *et al.*, 47 Md., 321; Potts *v.* House, 6 Ga., 334; Irish *v.* Smith, 8 S. & R., 573; Logan *v.* McGinnis, 12 Pa., 27; Eckert *v.* Flowry, 43 Pa., 46. Many cases decide that the opinions of the subscribing witnesses as to the capacity of the testator are admissible without first receiving testimony of the facts upon which the opinion is based: Poole *v.* Richardson, 3 Mass., 330 (1807); Com. *v.* Brayman, 136 Mass., 438 (1884); Logan *v.* Maginnis, 12 Pa., 27 (1849); Eckert *v.* Flowry, 43 Pa., 46 (1862), Titlow *v.* Titlow, 54 Pa., 216 (1867); Williams *v.* Lee, *et al.*, 47 Md., 321; Van Huss *v.* Rainbolt, *et al.*, 42 Tenn. (2 Cold.), 139; Potts, *et al.*, *v.* House, 6 Ga., 334.

The conflict of authority is upon the admission of witnesses who are neither experts nor subscribing witnesses to wills to give their opinion as to mental capacity. That the best authority favors the competency of such evidence there is not a doubt. In State *v.* Pike, 49 N. H., 408, 409, DOE, J., in his dissenting opinion, says: "That in England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent that it seems no English lawyer has ever presented to any court any objection, question or doubt in regard to it. But in Wright *v.* Tatham, 5 Cl. & Fin., 670; S. C., 4 Bing., N. C., 489, the question was involved in such a manner and the number and strength of the judicial opinions were such as to make that case an authority of the greatest weight in favor of the competency of the evidence. In his dissenting opinion, filed in Boardman *v.* Woodman, 47 N. H., 144, the same judge says: 'Since the decision in Dewitt *v.* Bailey, 9 N. Y., 371, was overruled in the same case, 17 N. Y., 340, there has been almost perfect unanimity of authority in favor of such testimony. The supposition that such testimony was not re-

ceived in the English common law courts is erroneous: Eagleton *v.* Kingston, 8 Ves., Jr., 439, 449, 450; 452; Tatham *v.* Wright, 2 Kuss. & Myl., 1, pp. 375, 376 of Ingraham's edition; Lowe *v.* Joliffe, 1 W. Bl., 365; Attorney-General *v.* Pamther, 3 Br. C. C., 441, 442; King *v.* Arnold, 16 St. Tr., 695, 706, *et seq.* King *v.* Terress, 19 St. Tr., 885, 923, *et seq.*' "

In the United States Supreme Court non-expert opinion in issues of insanity is admitted. In the case of Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S., 612, the Court decided that the answer of a witness, who had previously testified as to the appearance of the person whose sanity was in question, to the question, "What was the impression left upon your mind by the conduct, actions, manners expressions and conversation of P.?" that "he was crazy and didn't know what he was doing," and "I thought he was out of his head," was properly admitted in evidence. "Whether an individual is insane is not always solved by abstruse metaphysical speculation, expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. While the *mere* opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value, because the natural and ordinary operations of the human intellect and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached." See also Hopt *v.* Utah, 120 U. S., 430, 437, *et seq.*; Parkhurst *v.* Horsford (C. C. D. Oregon, 1884), 21 Fed. Rep., 827.

The New York Rule.—F. S. Rice, Esq., in his recently published work on "Evidence," at p. 348, cites the New York rule as being the "most satisfactory, and has the additional advantage of being well understood and settled beyond cavil by a long line of adjudication." The rule as accepted is laid down in Clapp. *v.* Fullerton, 17 N. Y., 340 (1866), that where non-professional witnesses, who did not attest the execution of a will, are examined as to matters within their own observation, bearing upon the competency of the testator, they may characterize, as in their opinion rational or irrational, the acts and declarations to which they testify; but the examination must be limited to their conclusions from the specific facts they disclose, and they cannot be permitted to express their opinions on the general question whether the mind of the testator was sound or unsound. Real *v.* State, 42 N. Y., 270; Howell *v.* Taylor, 11 Hun., 214; Arnold's Will, 14 Hun., 525; Bell *v.* McMasters, 29 Hun., 272; Ross' Will, 87 N. Y., 514; Holcomb *v.* Holcomb,

95 N. Y., 316; People *v.* Couroy, 97 N. Y., 62. This rule confines the testimony of each witness to the designation as rational or otherwise those particular acts of the individual which have come under his personal observation. By excluding testimony as to the general issue, the jury are permitted to determine the question by considering the conclusions drawn by each witness from the facts observed by him.

The Connecticut Rule.—In Shanley's Appeal, decided on November 1, 1892, in the Supreme Court of Errors of Connecticut, the action of the lower court in admitting the question, whether from the witness' observation of the testatrix he could say she was of sound mind, was approved by ANDREWS, C. J., quoting the opinion of LOOMIS, J., upon the same question in Sydleman *v.* Beckwith, 43 Conn., 9. "It is in all cases important, with a view to confirm the opinion, that the witness should be able to state such facts as will show presumptively that his opinion is well founded. But it is not quite correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include, among the facts referred to, the acquaintance of the witness with the subject-matter, and his opportunities for observation. The very basis upon which, as we have seen, this exception to the general rule rests, is that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the testator at the time." The distinction between the rules is that in any case the New York rule will not permit non-expert testimony upon the general issue, while the Connecticut rule measures the opinion the witness may give by his acquaintance and opportunities for observation. (See opinion in Shanley's Appeal, *supra.*) Although the authority given prefers the New York rule, yet it is difficult to see that its operation will be widely different from that of the Connecticut rule. In a case like that of Shanley's Appeal, where the acquaintance and opportunities for observing the testatrix extended over a considerable period, testimony that her acts and conduct within that period were rational or irrational is no less than direct testimony of sanity or insanity. The advantage of the New York rule is that it still preserves the jury in their capacity as triers of the issue, and enables them, as has been said, to form an opinion from the conclusions drawn by each witness from the facts observed by him.

In few of the States, however, do the reported cases indicate anything further than that the exception to the broad rule of evidence is recognized, and witnesses who are not experts may state their opinions after giving the facts upon which they are based. Whether these opinions must be given according to the Connecticut or New York rules cannot be ascertained. In Pennsylvania the courts seem to lean to the admission of testimony of the general issue based upon knowledge of particular facts. Thus in Pidcock *v.* Potter, 68 Pa., 342, the Court said: "In Pennsylvania it has always been the rule that after a non-professional witness has stated the facts upon which his opinion is founded he is permitted to state his opinion as to the

sanity or insanity of the testator." See also Rambler *v.* Lyon, 7 S. and R., 90; Urgan *v.* Small, 11 S. and R., 141; Titlow *v.* Titlow, 4 P. F. S., 216; Dickinson *v.* Dickinson, 11 P. F. S., 401; Bank *v.* Wirebach's Executors, 12 W. N. 150; Swails, Appellant, *v.* White, 1 Adv. Rep., 856 (1892). In the case of Conn. Life Ins. Co. *v.* Lathrop, 111 U. S., 612, the court favor testimony of the general issue. See also 41 Tex., 125; 20 Nev., 333; Crim. Law Mag., 72; 51 Vt. 296; 61 Vt., 534; Hardy *v.* Merrill, 56 N. H., 227; 9 R. I., 377.

Favoring the New York rule, see 44 Iowa, 229; 5 Blackf. (Ind.), 217; 56 Ind., 343; 69 Ind., 108; 75 Ind., 511; 123 Ind., 337; 109 Ill., 69; 71 Ala., 385; 59 Cal., 392.

The Massachusetts Rule.—In Massachusetts, the case of Poole *v.* Richardson, 3 Mass., 330 (1807), the court permitted the subscribing witnesses to the will to give their opinions as to the sanity of the testator, and permitted other witnesses to testify to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred, but not merely their opinion or judgment. In commenting upon the case, DOE, J., in State *v.* Pike (49 N. H., 399), says: "There is reason to suspect that the only point ruled in this case was that the witnesses were allowed to give their opinions when they stated the particular facts from which the state of the testator's mind was inferred by them." This case is the corner-stone upon which the Massachusetts courts have built their rule, and it is certain that in subsequent cases the error has been perceived and regretted. In Baxter *v.* Abbott, 7 Gray, 71, 79, THOMAS, J., said: "If it were a new question I should be disposed to allow every witness to give his opinion subject to cross-examination upon the reasons upon which it is based, his degree of intelligence and his means of observation." Some of the later cases indicate a tendency to escape to some extent the evil effects of the rule by the circuitous method of a mere technical distinction. Thus in Nash *v.* Hunt, 116 Mass., 237 (1874), the Court (WELLS, J.), pronounced that the answer of a witness that "he perceived nothing unusual or singular respecting 'the testator's mental condition' was competent, not being an expression of opinion as to condition of the mind itself, but only of its manifestation in conversation." Again, in Commonwealth *v.* Sturtivant, 117 Mass., 122, 133, a witness was permitted to give "the conclusion of fact to which his judgment, observation and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general."

And in Com. *v.* Brayman, 136 Mass., 438 (1884), COLBURN, J., decided that a person of ordinary intelligence, who was familiarly acquainted with an individual, might testify whether within a given time he has failed mentally or physically, but might not give his opinion upon the facts upon which this conclusion is based. It seems that this opinion is self-contradictory. To say that a man has failed mentally or physically within a given time is not a conclusion of fact, but a conclusion *from* fact, and is a matter of opinion just as much as to describe a sound or color. In McCarmel *v.* Wildes, 153 Mass.,

487 (1891), it was permitted to ask an executor whether he had observed any fact which led him to infer any derangement of intellect, with the qualification that he was to state facts only. The natural conclusion would be that this decision sounded the note of emancipation from the bondage of the rule, and the decision of Smith *v.* Smith, in 1892, certainly may be the subject of legitimate surprise. In State *v.* Pike, the Court in commenting upon Poole *v.* Richardson, says: "If the Court had been aware that this rul ing overturned all the authorities and the uniform practice in England and America from the beginning of the common law to that day, it is not to be presumed that the ruling would have been made without a formal opinion reduced to writing by some member of the Court, formally delivered and formally reported, giving some reason for the innovation. If they had been conscious of the novel and revolutionary character of the precedent, they would not have intro duced it so summarily and incon siderately."

When, in 1820, the eastern counties of Massachusetts became the State of Maine, the rule of the Massachusetts courts was adhered to. In Wyman *v.* Gould, 47 Me., 159 (1859), it was held that an expert only can be permitted to state how a party "appeared," in respect to soundness or unsoundness of mind. In Snow *v.* Boston & Maine, 65 Me., 230, however, non-expert opinion was held to be admissible where it is founded upon knowledge open to all, and is the result of personal knowledge, and relates to the ordinary affairs of life, such as the value of property, the appearance or identity of person, etc. And in Fayette *v.* Chesterville, 77 Me., 28, the Court said: "The tendency in our practice has been to allow witnesses not experts a good deal of latitude in the expression of opinion short of declaring their judgments upon the point and directly in issue." Thus, in Robinson *v.* Adams, 62 Me., 410, a witness was permitted to say that she observed no failure of mind and nothing peculiar. The tendency of the Maine decisions do, it is true, tend toward a recognition of the exception to the rule of exclusion, but as yet they strive to adhere to the old rule, bending it as circumstances may require.

In New Hampshire the courts excluded all non-expert opinion until the decision of Hardy *v.* Merrill, 56 N. H., 227 (1875), which overruled the decisions of Boardman *v.* Woodman, 47 N. H., 120, and State *v.* Pike, 49 N. H., 399. In the latter case a strong dissenting opinion was filed by DOE, J., which is quoted freely, *supra*. From the cases cited in the learned opinion of FOSTER, C. J., in Hardy *v.* Merrill, it appears that, notwithstanding the decisions above cited, that the Massachusetts exception to the universal rule never was really established in New Hampshire, as the case of Hamblett *v.* Hamblett, 6 N. H., 333 (1833), which in Boardman *v.* Woodman was called the "corner-stone of the established usage," not only does not support the doctrine, in whose aid it was invoked, but is in conflict with the earlier cases of State *v.* Ryan (1811); Trial of Daniel D. Fanner (1821); Trial of Amos Furnal (1825); State *v.* Conay (1830); see Hardy *v.* Merrill, 56 N. H., 236, *et seq.*

Texas is named by the text-

writers as a follower of the Massachusetts exception, but the case of Gehrke *v.* State, 13 Tex., 568, upon which they rely, does not support their position, nor do the later decisions in the Texas courts regard it an authority. In that case an effort was made to prove insanity not by the knowledge of the witness of the fact of insanity, but by comparison of some other insane person that the witness said he knew, and who was known to be insane. It is true that the Court said that it would be equally improper to receive the vague expression that the prisoner looked or acted like an insane person; but this seems to be on the ground that experts were present who might have been examined had they been called. In Thomas *v.* State, 40 Tex., 60, the Court, in holding the opinions of non-professional witnesses as to insanity admissible, expressly said: "The views here expressed are not in conflict with the case of Gehrke *v.* State. That case is not in point:" McClackey *v.* State, 41 Tex., 125; McClackey *v.* State, 5 Tex. App., 320; Webb *v.* State, Id., 596; Campbell *v.* State, 10 Tex. App., 560.

Maine and Massachusetts alone now maintain the exception to what has become the universal rule.

HENRY N. SMALTZ.

DEPARTMENT OF EQUITY.

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KRUMBHAAR *v.* GRIFFITHS ET AL.[1]

Equity—Fraud—Confidential Relation—Officer of Corporation and Stockholder.

Plaintiff, a stockholder in a corporation, applied to defendant, the secretary of the company, for information as to the condition of the company and the value of its stock. Defendant stated what the earnings of the company had been, but did not state that a lease of a portion of the company's property had been made, containing an option to lessee to lease additional property. Defendant then made plaintiff an offer for his stock, which plaintiff accepted. Soon after, the option under the lease having been exercised, the stock rose greatly in value, and plaintiff having demanded a retransfer of his stock and been refused, filed a bill. The master found, as a fact, that at the time defendant bought plaintiff's stock he did not know of anything that was pending, or of any movement in contemplation, likely to cause a rise in the value of the stock.

[1] 31 W. N. C., 244; 151 Pa., 223.